Mohd Zulhialmi bin Md Darus v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(M)-521–11 OF 2019, B-05(M)-522-11 OF 2019 AND B-05(M)-523–11 OF 2019

HANIPAH FARIKULLAH, AHMAD NASFY AND NORDIN HASSAN JJCA

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether failure to order amended charge to be read to appellants resulted in miscarriage of justice — Whether trial judge erred in application of accomplice evidence — Whether circumstantial evidence sufficient to prove amended charges of murder and abetment — Whether abetment proven — Whether trial judge's failure to make finding on abetment caused miscarriage of justice — Whether death and cause of death of can be proven without deceased's body — Whether trial judge erred in invoking adverse inference for failure to call defence witnesses — Criminal Procedure Code s 158(2) — Penal Code s 107

Evidence — Accomplice — Witness — Whether witness was an accomplice based on act and involvement — Whether witness was competent — Whether trial judge misdirected himself in application of accomplice evidence — Evidence Act s 133

These were the appeals by three appellants against their convictions and sentences by the High Court. According to the prosecution's case, PW7, the eyewitness, opened the door of the second room in an apartment and saw the second appellant ('third accused') strike the deceased three times with a stick on the deceased's head until the stick broke resulting in the deceased falling on the floor. PW7 also saw blood on the floor and the wall in the room where the deceased was struck by the second appellant.PW7 then asked the second appellant why he hit the deceased and he said that the third appellant had paid him money to do it. Thereafter, the third appellant entered the room and met with the second accused and PW7. The third appellant then told PW7 that she was instructed by the first appellant and that if PW7 ran away, she would implicate PW7 with the incident. PW7 had no choice but to adhere to the instruction and they wrapped the deceased body with a thin mattress. The mattress was then tied with rope and cloth. Subsequently, the third appellant asked PW7 and the second appellant to carry the deceased's body down to the first appellant's car that was waiting downstairs. Then, the first appellant asked the third appellant and PW7 to follow him to Langkawi in his car. He also

threatened PW7 that if he refused to follow, the first appellant would blame him for the incident that happened. Thus, out of fear, PW7 complied with the request and he together with the third appellant followed the first appellant to Langkawi. The second appellant did not follow them as he was asked by the first appellant to go home and that he would bank in all transactions. On the way to Langkawi, they stopped the car near a jungle and the first appellant burned the deceased's bag and clothes. PW7 subsequently ran away from the first and third appellants after hearing that the first appellant wanted to kill him. On 30 August 2016 and 3 September 2016, amounts of RM500 and RM1,000 respectively were banked in the second appellant's bank account in CIMB Bank. The deceased body was never found. Subsequent thereto, the deceased father's attempts to contact the deceased were unsuccessful. SP4 thereafter lodged a police report which resulted in the arrest of the appellants. The first and third appellant were charged with abetting the second appellant in an offence of murder whilst the second appellant was charged for an offence of murder of the deceased. All the appellants were convicted by the trial judge and sentenced to death. Aggrieved, the appellants appealed on the grounds that the trial judge had, inter alia: (a) failed to order the amended charge to be read to all the accused resulting in a miscarriage of justice; (b) misdirected himself in the application of accomplice evidence of PW7; (c) failed to consider that the circumstantial evidence presented by the prosecution was insufficient to prove the amended charges against all the accused; (d) failed to make a finding that the element of abetment had been proven against the first and third appellants; and (e) erred in applying an adverse inference against the defence for non-calling of witnesses mentioned in the defence.

Held, dismissing the appeals:

(1) There was no miscarriage of justice suffered by the appellants or any prejudicial effect on all the appellants due to the omission to read and explain the amended charges. The amendment was only as to the date of the offence. The rest of the particulars of the charges remained the same and did not change the nature of the charges. More importantly, the defence presented by all the appellants showed that they appreciated the charges and did not in any way show that they were confused or misled by the amended charges. Thus, there was no miscarriage of justice against the appellants regarding this issue.In addition, all the appellants were represented by counsels during the trial. The counsels may apply to the court, if need be, to recall any witness, and the omission of the trial judge to inform the appellants' rights to recall any witnesses did not affect the decision of the case. In the circumstances, the issue related to the amendment of charges raised by the counsels was bereft of any merit (see paras 52–54).

(2) PW7 had no prior knowledge of the offence to be committed by all the accused. He was merely present at the crime scene and saw the second

appellant strike the deceased on the head as he entered the room when asked by the third appellant. Thereafter, PW7 was threatened by the third appellant to wrap the deceased's body with a mattress and later to carry the body into the first appellant's car. As PW7 had not played an active role in the commission of the offence charged, PW7 was not an accomplice and the trial judge was correct in treating him as an ordinary prosecution's witness. In any event, besides the provision of s 133 of the Evidence act 1950 with regard to the competency of an accomplice as a witness, the evidence of PW7 was corroborated, in particular, by PW9 and PW10. These witnesses were found as credible witnesses by the trial judge. As such, the issue of accomplice was untenable (see paras 59, 61 & 64).

(3) In the present case, the prosecution was not only relying on circumstantial evidence, in particular, the evidence of PW9 and PW10, but also the direct evidence of PW7 who was at the scene and saw the second appellant strike the deceased on the head three times with the stick until the stick broke. Based on the totality of evidence before the court, the prosecution had proved all the elements of the amended charges against all the accused. The deceased death was established by the evidence of PW4, PW5, and PW6 who testified that the deceased did not return home after he left home on 29 August 2016. PW10 then confirmed that the deceased picture ('P36') was the person that she saw at the apartment on the material date. The evidence of PW7 then established the fact that the second appellant intentionally inflicted the injury on the deceased which in the ordinary course of nature caused death. Hence, cl (c) of s 300 of the Penal Code had been proven. Failure to find the deceased body, did not prevent a conviction of the offence of murder if the evidence was sufficient to prove the offence beyond a reasonable doubt. As such, the issue of insufficient circumstantial evidence was without merit (see paras 67–70).

(4) There was overwhelming evidence that the first and third appellants abetted the commission of the murder by the second appellant although the trial judge had not addressed the issue of abetment by the first and third appellants. The prosecution had proved the charge of abetment against the first and third appellants. Based on the overwhelming evidence that proved the offence of abetment of murder, there was no miscarriage of justice against the first and third appellants on the misapplication of the law by the trial judge. In any event, the trial judge did mention in his grounds of judgment that the prosecution had proved the offence of abetment of murder against the first and third appellants. Therefore, there was no merit in the issue (see paras 77–78 & 81).

(5) The trial judge did assess in detail the evidence of the defence, and at the end of the case found that the defence had failed to raise a reasonable

doubt on the prosecution case. The basis of the trial judge's finding that the defence had failed to raise reasonable doubt on the prosecution case was based on the evaluation of the evidence in totality and not on the adverse inference made against the appellants. In the circumstances and with the overwhelming evidence against all the appellants, there was no miscarriage of justice against all the appellants that occurred in relation to this issue. A reasonable tribunal would have also convicted all the appellants on the available evidence in this case (see paras 84–85).

[Bahasa Malaysia summary

Ini adalah rayuan oleh tiga perayu terhadap sabitan dan hukuman mereka oleh Mahkamah Tinggi. Menurut kes pendakwaan, PW7 yang merupakan saksi mata telah membuka pintu bilik kedua di sebuah pangsapuri dan melihat perayu kedua ('tertuduh ketiga') memukul si mati sebanyak tiga kali dengan sebatang kayu di kepala si mati sehingga kayu tersebut patah dan menyebabkan si mati terjatuh di atas lantai. PW7 juga melihat darah di lantai dan dinding di dalam bilik di mana si mati telah dipukul oleh perayu kedua. PW7 kemudian bertanya kepada perayu kedua mengapa beliau memukul si mati dan beliau berkata bahawa perayu ketiga telah membayar wang kepadanya untuk melakukannya. Selepas itu, perayu ketiga memasuki bilik tersebut dan melihat tertuduh kedua dan PW7. Perayu ketiga kemudian memberitahu PW7 bahawa dia diarahkan oleh perayu pertama dan sekiranya PW7 melarikan diri, dia akan melibatkan PW7 dengan kejadian itu. PW7 tidak mempunyai pilihan selain mematuhi arahan dan mereka membungkus mayat si mati dengan tilam nipis. Tilam itu kemudiannya diikat dengan tali dan kain. Seterusnya, perayu ketiga meminta PW7 dan perayu kedua untuk membawa mayat si mati ke dalam kereta perayu pertama yang sedang menunggu di tingkat bawah. Kemudian, perayu pertama meminta perayu ketiga dan PW7 untuk mengikutinya ke Langkawi di dalam keretanya. Beliau juga mengugut PW7 bahawa jika beliau enggan mengikutinya, perayu pertama akan menyalahkannya atas kejadian yang berlaku. Oleh itu, kerana takut, PW7 mematuhi arahan tersebut dan beliau bersama perayu ketiga mengikuti perayu pertama ke Langkawi. Perayu kedua tidak mengikutinya kerana beliau telah diminta oleh perayu pertama untuk pulang ke rumah dan bahawa dia memasukkan semua transaksi ke dalam bank. Dalam perjalanan ke Langkawi, mereka memberhentikan kereta berhampiran hutan dan perayu pertama membakar beg dan pakaian si mati. PW7 kemudiannya melarikan diri daripada perayu pertama dan ketiga selepas mendengar bahawa perayu pertama mahu membunuhnya. Pada 30 Ogos 2016 dan 3 September 2016, masing-masing berjumlah RM500 dan RM1,000 dimasukkan ke dalam akaun bank perayu kedua di CIMB Bank. Mayat si mati tidak pernah dijumpai. Selepas itu, percubaan bapa arwah untuk menghubungi si mati tidak berjaya. SP4 selepas itu membuat laporan polis sehingga menyebabkan perayu ditahan. Perayu pertama dan ketiga didakwa bersubahat dengan perayu kedua atas kesalahan membunuh manakala perayu kedua didakwa atas kesalahan

membunuh si mati. Kesemua perayu telah disabitkan kesalahan oleh hakim perbicaraan dan dijatuhi hukuman mati. Terkilan dengan keputusan tersebut, perayu-perayu merayu atas alasan hakim perbicaraan telah, antara lain: (a) gagal memerintahkan pertuduhan pindaan dibacakan kepada semua tertuduh sehingga menyebabkan ketidakkeadilan; (b) terkhilaf dalam permohonan keterangan rakan sejenayah PW7; (c) gagal mempertimbangkan bahawa keterangan keadaan yang dikemukakan oleh pihak pendakwaan tidak mencukupi untuk membuktikan pertuduhan terpinda terhadap semua tertuduh; (d) gagal membuat dapatan bahawa unsur bersubahat telah dibuktikan terhadap perayu pertama dan ketiga; dan (e) terkhilaf dalam membuat anggapan berbalik/buruk terhadap pihak pembelaan kerana tidak memanggil saksi yang disebut dalam pembelaan.

Diputuskan, menolak rayuan-rayuan:

(1) Tidak wujud ketidakadilan atau prejudis kepada perayu-perayu kerana pertuduhan yang dipinda itu tidak dibacakan. Pindaan itu hanyalah pada tarikh kesalahan tersebut. Butiran tuduhan tetap sama dan tidak mengubah sifat pertuduhan. Lebih penting lagi, pembelaan yang dibangkitkan oleh semua perayu menunjukkan bahawa mereka memahami pertuduhan dan sama sekali tidak menunjukkan bahawa mereka keliru atau salah faham dengan pertuduhan yang dipinda itu. Oleh itu, tiada sebarang ketidakadilan terhadap perayu berhubung isu ini. Selain itu, kesemua perayu diwakili peguam semasa perbicaraan. Peguam boleh memohon kepada mahkamah, jika perlu, untuk memanggil semula mana-mana saksi, dan hakim perbicaraan yang tidak memaklumkan hak perayu untuk memanggil semula mana-mana saksi tidak menjejaskan keputusan kes tersebut. Dalam keadaan ini, isu yang berkaitan dengan pindaan pertuduhan yang dibangkitkan oleh peguam adalah tidak bermerit (lihat perenggan 52–54).

(2) PW7 tidak mempunyai pengetahuan awal mengenai kesalahan yang akan dilakukan oleh semua tertuduh. Beliau hanya hadir di tempat kejadian dan melihat perayu kedua memukul si mati di kepala ketika memasuki bilik apabila diminta oleh perayu ketiga. Selepas itu, PW7 telah diugut oleh perayu ketiga untuk membalut mayat si mati dengan tilam dan kemudian membawa mayat ke dalam kereta perayu pertama. Oleh kerana PW7 tidak memainkan peranan aktif dalam pelakuan kesalahan tersebut, PW7 bukanlah rakan sejenayah dan hakim perbicaraan betul dalam menganggapnya sebagai saksi pendakwaan biasa. Dalam apa jua keadaan, selain peruntukan s 133 Akta Keterangan 1950 berkenaan dengan rakan sejenayah yang kompeten sebagai saksi, keterangan PW7 telah disokong, khususnya, oleh PW9 dan PW10. Saksi-saksi ini didapati sebagai saksi yang boleh dipercayai oleh hakim perbicaraan. Oleh itu, isu mengenai rakan sejenayah yang dibangkitkan tidak dapat dipertahankan (lihat perenggan 59, 61 & 64).

(3) Dalam kes ini, pihak pendakwaan bukan sahaja bergantung kepada keterangan keadaan, khususnya, keterangan PW9 dan PW10, tetapi juga keterangan langsung PW7 yang berada di tempat kejadian dan melihat perayu kedua menyerang si mati di kepala tiga kali dengan kayu sehingga kayu tersebut patah. Berdasarkan keseluruhan keterangan di hadapan mahkamah, pihak pendakwaan telah membuktikan semua elemen pertuduhan yang dipinda terhadap kesemua tertuduh. Kematian dibuktikan dengan keterangan PW4, PW5, dan PW6 yang memberi keterangan bahawa si mati tidak pulang ke rumah selepas dia meninggalkan rumah pada 29 Ogos 2016. PW10 kemudian mengesahkan bahawa gambar arwah ('P36') adalah orang yang dilihatnya di pangsapuri itu pada tarikh material tersebut. Keterangan PW7 kemudiannya membuktikan fakta bahawa perayu kedua dengan sengaja menyebabkan kecederaan pada si mati yang dalam keadaan biasa menyebabkan kematian. Justeru, klausa (c) s 300 Kanun Keseksaan telah dibuktikan. Kegagalan untuk mencari mayat si mati, tidak menghalang sabitan kesalahan membunuh sekiranya bukti mencukupi untuk membuktikan kesalahan itu melampaui keraguan munasabah. Oleh itu, isu keterangan keadaan yang tidak mencukupi adalah tanpa merit (lihat perenggan 67–70).

(4) Terdapat bukti kukuh bahawa perayu pertama dan ketiga bersubahat melakukan pembunuhan itu dengan perayu kedua walaupun hakim perbicaraan tidak meneliti isu perayu pertama dan ketiga bersubahat. Pihak pendakwaan telah membuktikan pertuduhan bersubahat terhadap perayu pertama dan ketiga. Berdasarkan bukti kukuh yang membuktikan kesalahan bersubahat membunuh, tidak wujud ketidakkeadilan terhadap perayu pertama dan ketiga atas salah tafsiran undang-undang oleh hakim perbicaraan. Dalam apa jua keadaan, hakim perbicaraan telah menyebut dalam alasan penghakimannya bahawa pihak pendakwaan telah membuktikan kesalahan bersubahat membunuh terhadap perayu pertama dan ketiga. Oleh itu, tiada merit dalam isu ini (lihat perenggan 77–78 & 81).

(5) Hakim perbicaraan telah menilai secara terperinci keterangan pihak pembelaan dan pada akhir kes mendapati pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Asas dapatan hakim perbicaraan bahawa pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan adalah berdasarkan penilaian bukti secara menyeluruh dan bukan pada inferens buruk yang dibuat terhadap perayu. Dalam keadaan dan bukti kukuh terhadap semua perayu, tiada ketidakadilan terhadap semua perayu yang berlaku berhubung isu ini. Tribunal yang munasabah juga akan mensabitkan semua perayu atas bukti yang ada dalam kes ini (lihat perenggan 84–85).]

Cases referred to

Abu Bakar v Regina [1963] 1 MLJ 288; [1963] 1 LNS 4 (refd)
Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800 (refd)
Azhar bin Che Wil v PP [2010] 6 MLJ 22; [2010] 8 CLJ 905, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389, FC (refd)
Hee Nyuk Fook v PP [1988] 2 MLJ 360, SC (folld)
Khoo Hi Chiang v PP & another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
Kuan Ted Fatt v PP [1985] 1 MLJ 211, FC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)
Md Zainuddin bin Raujan v PP [2013] 4 MLJ 596, CA (refd)
Mohd Shawal bin Abdullah v Pendakwa Raya (Criminal Appeal K-05(M)-160–04 of 2016) (unreported), CA (refd)
Pasupathy a/l Kanagasaby v PP [2005] 1 MLJ 493, CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
PP v Mohd Radzi Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)
Sunny Ang v PP [1966] 2 MLJ 195, FC (folld)
Tan Foo Su v PP [1967] 2 MLJ 19; [1967] 1 LNS 179, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)
Virsa Singh v State of Punjab [1958] AIR 465, SC (refd)
Zulkiple bin Mohamad v PP [2022] 1 MLJ 479; [2022] 1 CLJ 673, FC (refd)

Legislation referred to

Criminal Procedure Code ss 158(2), 162
Evidence Act 1950 ss 113, 114(g), 133
Penal Code ss 34 , 107, 109, 300, 300(c), 302

Appeal from: Criminal Trial Nos 45B-32–04/2017 and 45B-33–05/2017 (High Court, Shah Alam)

Hanif Hassan (Hanif Hassan & Co) in Criminal Appeal No B-05(M)-521–11 of 2019 for the appellant.
Mohd Ishrakh Saad (with Nurul Ikrimah bt Mohd Raya) (Ishrakh Saad & Co) in Criminal Appeal No B-05(M)-523–11 of 2019 for the appellant.
Gabriel Susayan (with Khirranya Ganisan) (Gabriel Susayan & Partners) in Criminal Appeal No B-05(M)-522–11 of 2019 for the appellant.
Mohd Mukhzany Fariz bin Mohd Mokhtar (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal Nos B-05(M)-521–11 of 2019, B-05(M)-523–11 of 2019 and B-05(M)-522–11 of 2019 for the respondent.

Nordin Hassan JCA (delivering judgment of the court):

[1] In the present case, there are three separate appeals before us by the appellants against their convictions and sentence by the High Court Shah Alam Selangor. The first appellant, Mohd Zulhiami bin Md Darus and the third appellant, Siti Nor Asiah bt Abdul Wahab were charged with abetting the second appellant in an offence of murder whilst the second appellant, Muhammad Rahmat bin Nazarudin was charged for an offence of murder of one Mohammad Fairul Haqimmie bin Mokhter ('the victim'). All the appellants were convicted by the trial judge and sentenced to death.

[2] The first appellant's appeal was registered as Appeal No B-05(M)-521–11 of 2019, the second appellant as Appeal No B-05(M)-522–11 of 2019 and the third appellant with Appeal No B-05(M)-523–11 of 2019.

[3] In the High Court, Mohd Zulhiami bin Md Darus was the first accused, Siti Nor Aishah bt Abdul Wahab the second accused and Muhammad Rahmat bin Nazarudin was the third accused. For ease of reference, we will refer them as they were in the High Court.

[4] The charge for abetment of murder against the first and second accused are as follows:

> Bahawa kamu pada 30 Ogos 2016 jam lebih kurang 4 pagi bertempat di No.5-15B Apartment Villa Sentosa, Jalan Dato' Yusof Shahbudin 3, Taman Sentosa, di dalam daerah Klang, di dalam Negeri Selangor, telah bersubahat bersama Muhammad Rahmat bin Nazarudin (KPT: 940312–10–5451) untuk membunuh seorang lelaki bernama Mohammad Fairul Haqimmie bin Mokhter (KPT: 950204–06–5615) dan telah membunuh lelaki tersebut, di mana kesalahan tersebut telah dilakukan akibat persubahatan kamu. Oleh itu, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan yang dibaca bersama seksyen 302 Kanun Keseksaan.'

[5] Meanwhile, the charge for the offence of murder against the third accused is as follows:

> Bahawa kamu pada 30 Ogos 2016 antara jam lebih kurang 4 pagi, bertempat di No. 5-15B, Apartment Villa Sentosa, Jalan Dato' Yusof Shahbudin 3, Taman Sentosa, di dalam daerah Klang, di dalam Negeri Selangor telah membunuh seorang lelaki bernama Mohammad Fairul Haqimmie bin Mokhter (KPT: 950204–6–5615) iaitu satu kesalahan di bawah seksyen 302 Kanun Keseksaan.

[6] We have heard the oral submission and read the written submissions by all parties as well as the records of appeal filed in this case. Having considered the evidence and the relevant laws, it is our unanimous decision that the

appellants' appeals are without merit, and as such, all the appeals are dismissed. Our analysis and decision are as follows.

The prosecution's case

[7] On 29 August 2016 at about 9am, Mohammad Fairul Haqimmie bin Mokhter ('the deceased') left his family's house at Felda Tersang 2, Raub Pahang to meet his girlfriend. On the same day at 6.10pm, the deceased informed his elder brother via SMS that he had reached Klang, Selangor. After this date, the deceased father's ('SP4') attempts to contact the deceased were unsuccessful. This resulted in SP4 lodging a police report, Cheroh report 646/16 (P15) on 2 September 2016 regarding his missing son.

[8] Zairul Noraidi bin Shahidin ('PW7'), the eyewitness and also a key witness for the prosecution testified as follows. PW7 rented a three rooms apartment on the fifth floor, the detail of which is mentioned in the charge. One of the rooms he rents out to his friends Fairuz and Nurul Balqis bt Ali Ezudin ('PW10'), one room for his use, and another room for his ex-girlfriend, Siti Nor Asiah bt Abdul Wahab also known as Kira, the second accused, who stayed there with her five years old son and a niece. PW7 visited the house once in a while as he stays with his mother at Sungai Udang, Klang, Selangor.

[9] On 28 August 2016 at about 7pm, PW7 met with the deceased at the apartment and was told by the deceased that the deceased was the new boyfriend of the second accused. At the material time, PW7 was in the apartment with the second accused and PW10. Then at about 7.30pm, PW10 left the apartment to go to her mother's house. Next at about 8.15pm, the second accused went out to buy something using PW7's motorcycle. After passed midnight, on 29 August 2016, a friend of PW7, Muhammad Rahmat bin Nazaruddin, the third accused came to the apartment. PW7 then called the second accused handphone but was unanswered. The second accused also did not reply to the messages sent by PW7.

[10] Next at about 3am the same day, PW7 went out to buy some food and came back to the apartment at about 4am. PW7 saw the second accused in the living hall and when asked, she said she placed her son and niece at Euro Hotel, Klang. When asked why he placed them at the hotel, the second accused said that she will inform him later.

[11] The second accused then asked PW7 to enter the second room or the middle room of the apartment and told him to see in the room ('cuba lah tengok dekat bilik tengah tu'). Thereafter, PW7 opened the door of the second room and saw the third accused strike the deceased three times with a stick on the deceased's head until the stick broke resulting in the deceased falling on the

floor. PW7 also saw blood on the floor and the wall in the room where the deceased was struck by the third accused.

[12] PW7 then asked the third accused why he hit the deceased and he said that the second accused paid him money to do it.

[13] Thereafter, the second accused then entered the room and met with the third accused and PW7. She then asked the third accused whether it was over ('dah selesai ke?'). At the same time, PW7 asked the second accused why did she do it ('Kenapa buat macam ni?') and she answered that she was instructed by the first accused. The third appellant also told PW7 that if he ran away, he will implicate PW7 with the incident.

[14] Next, the second accused discussed with the third accused what they should do, and thereafter the second accused suggested wrapping the deceased body. The second accused then asked the third accused and PW7 to wrap the deceased body. The second accused also warned PW7 that if he refused to follow the instruction and if the incident is known by others, she will implicate PW7 with the incident.

[15] PW7 had no choice but to adhere to the instruction and they wrapped the deceased body with a thin mattress in the third room. The mattress was then tied with rope and cloth. Having wrapped the deceased body, the second accused asked them to wait for the first accused.

[16] Thereafter, at about 9am, the first accused came to the apartment, and the second accused asked PW7 and the third accused to carry the deceased's body down to the first accused's Isuzu Dmax car that was waiting downstairs. This was done by them where the body was placed in the said car. The second accused also accompanied them downstairs and met with the first accused who was in the car. The car was driven by the first accused's niece, Apit, and the first accused also asked the third accused to follow him in the car. Next, the second accused asked PW7 to wait at the apartment with her for the first and third accused to return to the apartment.

[17] After both the first and third accused had returned to the apartment, the second accused asked PW7 to clean the house, in particular the blood stain on the wall and floor. PW7 acceded to this request and cleaned the house together with the third accused whilst the second accused sat in the living room. The pillow and blanket with blood stains were then put in a bag and were later burned by the second accused.

[18] Next, the first accused asked the second accused and PW7 to follow him to Langkawi in his car. He also threatened PW7 that if he refused to follow, the

first accused will blame him for the incident that happened. Thus, out of fear, PW7 complied with the request and he together with the second accused followed the first accused to Langkawi. The third accused did not follow them as he was asked by the first accused to go home and told that he will bank in all transactions ('segala transaksi akan dilakukan secara bank in').

[19] On the way to Langkawi, Kedah, PW7 heard the second accused asked the first accused, as to where to burn the deceased bag and clothes to which the first accused answered to burn it in the jungle. Thereafter they stopped the car near a jungle at Sungai Buaya, Teluk Intan, Perak, and the first accused burned the deceased's bag and clothes. The bag was brought by the deceased when the deceased came to the apartment to meet the second accused.

[20] In Langkawi, PW7 and the second accused stayed at a rented house of the first accused's friend but not even a day, PW7 ran away and boarded a bus to Larkin, Johor as he overheard the conversation between the first accused and the second accused over the phone, where first accused wanted to kill PW7.

[21] Another witness called by the prosecution, Rizaka bin Jamaluddin ('PW9') testified that he worked with the first accused and on 30 August 2016 the first accused invited him and his wife to go to Kuala Lumpur to celebrate Merdeka Day. They went to Kuala Lumpur with the first accused's Isuzu Dmax car driven by the first accused's niece, known as Apit. Upon reaching an apartment in Kuala Lumpur, PW9 saw two men from upstairs carrying a wrapped mattress which he does not know its content. The mattress was put at the back of the Isuzu Dmax and the third accused asked the mattress to be brought to a river. The third accused accompanied them and showed the way to the river. In the car were, the first accused, the third accused, Apit, PW9, and his wife. Having reached the river, the first and third accused carried the mattress to the river bank and PW9 was also asked to carry the same. Then the mattress was thrown by them in the river.

[22] They all then went back to the apartment, where PW7 and the second accused followed them into the car and went to Langkawi. On the way, PW9 saw the first accused burned a bag but PW9 was not sure of its content. Later, PW9 and his wife went back to his house in Pekan, Pahang.

[23] The next important prosecution witness was PW10. She testified that on 29 August 2016 at about the time for maghrib prayer, PW10 rode a motorcycle with her sister to the apartment to collect her belongings as she was no longer staying in the apartment. On the way there, she was stopped by the second accused at the garden below the apartment. The second accused was with her son and niece. Having been informed by PW10 that she was on the way to their apartment, the second accused told her to collect her belongings

some other day. The second accused then shouted PW7's name from downstairs and thereafter PW10 saw the deceased standing near the corridor of their unit apartment. PW10 recognized the deceased as the second accused had shown the deceased picture to her before this and told her that the first accused had promised to pay her RM2,500 to trap the deceased and pretend to be the deceased's girlfriend. She also told her that the first accused wanted to hit the deceased as the deceased had implicated the first accused.

[24] On the 30 August 2016 and 3 September 2016, amounts of RM500 and RM1,000 respectively were banked in the third accused's bank account in CIMB Bank.

[25] The deceased body has never been found to date.

The decision of the trial judge at the end of the prosecution case

[26] Having considered all the evidence presented by the prosecution on a maximum evaluation, the trial judge found that the prosecution had proved a prima facie case against all the accused on the charge proffered against them. In coming to this decision, the trial judge found that all the elements to establish the charges had been proven, and the offence of murder was established by the application of cl (c) of s 300 of the Penal Code. Thus, all the accused were called to enter their defence.

THE DEFENCE

The first accused

[27] The first accused gave evidence on oath and he testified that on 30 August 2016 he went to Kuala Lumpur with PW9, PW9's wife, and his niece Apit to celebrate Merdeka Day. They went there in the first accused's Isuzu Dmax car. As they were about to reach Kuala Lumpur, the first accused received a call from the second accused asking him to fetch her at her apartment as she also wishes to celebrate Merdeka Day. Upon reaching the said apartment, the first accused met with PW7 and another man. They waited for the second accused for about ten to 15 minutes but she did not turn up. Thereafter PW7 approached them and asked whether they can help him to throw some rubbish as he wanted to move house. When the first accused agreed to help, PW7 and the other man went upstairs and brought down the rubbish that was wrapped with something like a carpet. The rubbish was then put at the back of his car and PW7 said that the rubbish was to be thrown in the Klang River. PW7 then showed the way to a river and then the rubbish was thrown in the river by PW7 and the man that the first accused saw earlier also follow them in the car. After

that, they went back to the apartment and thereafter, the first accused, PW9 and his wife, Apit went to Ipoh and later returned to Pekan, Pahang. Then only they went to Langkawi, Kedah.

[28] Essentially, the first accused denied any involvement with the murder of the deceased and did not know that the rubbish that was wrapped with a carpet was the deceased body.

The second accused

[29] The second accused also gave evidence under oath and her evidence was that she never met with the deceased at all. Her relationship with the deceased was only on social media and through the telephone. She also denied asking the deceased to come to the said apartment in Klang. She further testified that on the material time and date, she had not communicated with the deceased and had no knowledge that the deceased will come to the apartment. The second accused also said that she does not know the third accused or met him at any time. Next, she denied having been involved in abetting the murder of the deceased.

The third accused

[30] The third accused in his sworn statement also denied any involvement in the murder of the deceased. He testified that he went to the apartment only three times and the last time was on 28 June 2016. He did not know the first and second accused and never met or heard the deceased name. On 30 August 2016, he initially said that he was under detention for another offence but later clarified that he was at work on that date based on his punch card at his office.

The decision of the trial judge at the end of the case

[31] Having analyzed and considered the evidence presented by the defence and other evidence in totality, it was the finding of the trial judge that the defence by all the accused was unreasonable and not credible or raised any reasonable doubt on the prosecution case. Thus, the prosecution had proved its case against all the accused beyond any reasonable doubt and convicted them on the charges as proffered against them. They were all sentenced to death as provided under the law.

[32] In the grounds of judgment, the trial judge concluded at the end of the case as follows:

> Setelah saya meneliti serta menghalusi akan keterangan dari saksi-saksi pendakwaan yang seramai 12 orang kesemuanya, serta mendengar dan menghalusi akan keterangan dari tertuduh-tertuduh sendiri, setelah meneliti serta menimbangkan

akan penghujahan di setiap peringkat, meneliti kepada kedudukan undang-undang yang berkaitan dengannya, mengkaji otoriti-otoriti kes yang dikemukakan, menilai serta menimbang kepada keterangan secara keseluruhannya, dengan ini mencapai suatu keputusan iaitu *pihak pembelaan di peringkat akhir kes pembelaan ini telah gagal menimbulkan sebarang keraguan yang munasabah terhadap kes pihak pendakwaan. Tiada keterangan berjaya dikemukakan bagi tujuan menimbulkan keraguan yang mnasabah. Sehingga ke akhir kes pembelaan ini, jelas bahawa pihak pendakwaan telah berjaya membuktikan kes mereka melampaui keraguan yang munasabah.*

Meneliti kepada scenario kes ini secara keseluruhannya, didapati yang *keterangan yang ditampilkan melalui saksi-saksi pendakwaan adalah begitu 'overwhelming' yang menunjukkan akan peranan yang dimainkan oleh ketiga-tiga tertuduh sehingga membawa kepada pembunuhan tragik ke atas Muhamad Fairul Haqimmie di masa dan di tempat kejadian seperti pertuduhan.* (Emphasis added.)

The appeal and issues raised by counsels for the accused before this court

[33] The issues submitted by counsels for all the accused in their oral and written submissions cumulatively are as follows:

(a) the trial judge failed to order the amended charge to be read to all the accused resulting in a miscarriage of justice;

(b) the trial judge had misdirected himself in the application of accomplice evidence;

(c) the trial judge failed to consider that the circumstantial evidence presented by the prosecution was insufficient to prove the amended charges against all the accused;

(d) the trial judge failed to make a finding that the element of abetment has been proven against the first and second accused;

(e) the death and cause of death of Muhammad Fairul Haqimmie bin Mokhter have not been proven especially since his body has not been found;

(f) the trial judge erred in applying an adverse inference against the defence for non-calling of witnesses mentioned in the defence case; and

(g) the trial judge erred in applying s 34 of the Penal Code in the present case.

THE ANALYSIS AND DECISION OF THIS COURT

[34] It is settled law that for the prosecution to establish an offence of murder punishable under s 302 of the Penal Code, the ingredients to be proved by the prosecution are the death of the deceased, the deceased died as a result of the injuries suffered, the injuries were caused by the accused and the accused's act

comes within one or a combination of the limbs under s 300 of the Penal Code.

[35] Section 300 of the Penal Code provides as follows:

> Except in the cases hereinafter excepted, *culpable homicide is murder* —
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) *if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;* or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. (Emphasis added.)

[36] In the present case, the prosecution is relying on cl (c) of s 300 of the Penal Code that the third accused intentionally caused bodily injuries to the deceased which is sufficient in the ordinary course of nature to cause death, and the first and second accused abetted the said offence.

[37] Reverting to cl 300(c) of the Penal Code, it is trite that the prosecution has to prove firstly, that the third accused intentionally caused the injury to the deceased, and secondly, the injury caused is sufficient in the ordinary course of nature to cause death. The intention to cause death is not an ingredient to be proved for the application of cl 300(c).

(See *Virsa Singh v State of Punjab* [1958] AIR 465 (SC); *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC).)

[38] In a recent Federal Court case of *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673, the elements to be proved for the application of cl (c) of s 300 was reiterated as follows:

> [28] The elements that the prosecution needs to prove in order to establish a case under cl (3) of s 300 of the Indian Penal Code, which corresponds with cl (c) of s 300 of our Penal Code, were spelt out by Vivian Bose J in *Virsa Singh* and they are as follows:
>
> (i) it must be established that a bodily injury is present;
>
> (ii) the nature of the injury must be proved;
>
> (iii) it must be proved that *there was an intention to inflict that particular*

bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and

(iv) it must be proved that the injury of the type described, made up of the three elements set out above, *is sufficient to cause death in the ordinary course of nature.* (Emphasis added.)

[39] The Federal Court in the same case, further explained the interpretation of the burden to prove intention under cl (c) of s 300 and its application in the following manner:

[50] It follows that where the case falls under cl (c) of s 300 of the Penal Code, there is no requirement for the prosecution to prove intention to cause death under cl (a), or knowledge of the likelihood of death under cl (b) or knowledge of the imminent danger of the act under cl (d). *What the prosecution needs to prove in order to bring the case under cl (c) of* s 300 *is to show that the injury proved to be present was caused intentionally and not accidentally and that the injury was sufficient in the ordinary course of nature to cause death.*

[51] We need to come back to *Virsa Singh* to hopefully clear the point beyond controversy. In that case, counsel for the appellant had in fact argued that the 'intention' that cl (c) of the Indian Penal Code requires must be related not only to the bodily injury inflicted but also to the clause 'and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death'. The Supreme Court disagreed and the reason for its disagreement was this: This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and, in that event, the thirdly would be unnecessary because the act would fall under the first part of the section, namely: If the act by which the death is caused is done with the intention of causing death.

[52] This exposition by the Supreme Court dispels any notion that under cl (c) of s 300 of the Penal Code*, the prosecution is required to prove that the bodily injury intended to be inflicted was intended to cause death in the ordinary course of nature. The only requirement under cl (c) is for the prosecution to prove that the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.*

[53] *The 'intention' or the mens rea element of murder under cl (c) of s 300 of the Penal Code must not be coalesced with the 'intention' or the mens rea element of murder under cl (a).* Under cl (a), death is the intended consequence and death results as intended, whereas under cl (c), death is not the intended consequence but death results, not because death is intended but because the bodily injury intended to be inflicted is of a kind that is sufficient in the ordinary course of nature to cause death. (Emphasis added.)

[40] In addition, it is also trite that intention cannot be proved by direct evidence but could be inferred from the accused act and the surrounding circumstances.

(See *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC); *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10 (FC); *Khoo Hi Chiang v Public Prosecutor & another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151 (SC); *Mohd Shawal bin Abdullah v Pendakwa Raya* (Criminal Appeal K-05(M)-160–04 of 2016) (unreported) (CA).)

[41] Reverting to the present case, the evidence established in court through direct evidence of PW7 was that the third accused struck the deceased on the head three times with a stick resulting in the deceased falling on the floor. The strike was so hard that the stick broke. PW7 also saw blood on the wall and floor in the said room. Evidence also revealed that the third accused hit the deceased as he was paid to do so. As such, we find beyond doubt that the third accused intended to cause injury to the deceased.

[42] Further, based on the evidence before the court, we also agree with the trial judge that the injury caused to the deceased in the ordinary course of nature caused death. This involved a finding of facts and the determination by the trial judge. We do not see any error in this finding. Although the deceased body was never found and as such no post mortem was conducted, this does not hinder the trial judge to make such a finding based on the available evidence before the court as alluded to earlier. In the circumstances, cl (c) of s 300 had been proven by the prosecution.

(See *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195.)

[43] Now we shall deal with the issues raised by counsels for the appellants.

The issue of whether the failure of the trial judge to order the amended charge to be read and explained to all the accused had resulted in a miscarriage of justice

[44] In this case, at the end of the prosecution case, the prosecution had made an application to amend the charges against the appellants. The amendment was as regard to the date of the offence which was 30 August 2016 from the earlier date in the charges which was 29 August 2016. These amended charges were not read and explained to all the accused.

[45] Counsels for the accused contended that the omission for the charges to be read and explained to the appellants was in contravention with s 158(2) of the Criminal Procedure Code ('the CPC') which provides:

> 158(1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) *Every such alteration or addition shall be read and explained to the accused.* (Emphasis added.)

[46] Further, it was submitted that all the accused were deprived of their rights to recall any witnesses as allowed under s 162 of the CPC which provides:

> 162 Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and *the accused shall be allowed to recall or re-summon and examine*, with reference to the alteration or addition, *any witness who may have been examined, and may also call any further evidence which may be material*. (Emphasis added.)

[47] Therefore, it was contended that the omission to read and explain the amended charges and the deprivation of the accused's rights to recall any witnesses had caused a miscarriage of justice.

[48] On this issue, it is an undisputed fact that the amended charges were not read nor explained to the appellants. The issue here is whether this omission had caused a miscarriage of justice and was fatal to the prosecution case.

[49] In deciding on this issue, firstly, the word 'shall' under s 158(2) of the CPC is not necessarily mandatory but only a directory, especially when no miscarriage of justice occurs. We find support in the Supreme Court case of *Hee Nyuk Fook v Public Prosecutor* [1988] 2 MLJ 360 where the same issue was raised for the court determination. In that case, the questions of law that were referred to the Supreme Court were as follows:

> (i) Where in the course of trial a charge is amended, is it mandatory to read and explain the amended charge to an accused person pursuant to the provision of s 158(ii) of the Criminal Procedure Code.
>
> (ii) If the answer to (a) is in the affirmative, then is the omission to read and explain the amended charge to an accused person a mere irregularity which can be cured by recourse to s 422 of the Criminal Procedure Code'

Section 158(ii) is the present s 158(2) of the CPC.

[50] Question (i) was answered by the Supreme Court in the negative and question (ii) was answered in the affirmative.

[51] Syed Agil Barakhbah SCJ delivering the judgment of the court said this:

> It was submitted that non-compliance with the provision of *s 158(ii) of the Criminal Procedure Code is an irregularity which is not curable under* s 422 of the Code.
>
> Section 158 states:
>
> (i) Any court may alter or add to any charge at any time before judgment is pronounced or in the case of trials by jury or trials with the aid of assessors before the verdict of the jury is returned or the opinions of the assessors are expressed.
>
> *(ii) Every such alteration or addition shall be read and explained to the accused.*
>
> Section 422 of the Code says:

A Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account:

> of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or
>
> ...
>
> unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice. [1988] 2 MLJ 360 at p 362

The question that arises is whether s 158(ii) is mandatory or directory. *In our view, the word 'shall' appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (see Interpretation of Statutes by Bindra, 7th Ed, p 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code, and decide in that order whether the matter is imperative or only directory* (see *Howard v Bodington* (1877) 2 PD 203 at p 211).

Applying the test to the facts and surrounding circumstances of the case, *we hold that in so far as this case is concerned, the provision of* s 158(ii) *is not imperative but directory*. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of trial. *A fortiori in the light of the provision of s 422 of the Code. The nature of the amendment being purely technical and in no way substantial has not rendered the omission to read over and explain the amended charge to the applicant at the close of the defence a serious irregularity as to vitiate the proceeding or has occasioned a failure of justice.*

...

... There was therefore no necessity at all for the President of the Sessions Court to read over and explain the amended charge to the applicant before proceeding to convict the applicant. *If at all there was any necessity, the occasion to do so does not amount to an irregularity which has occasioned a failure of justice and in any way prejudiced the trial by virtue of s 422 of the Code.* (Emphasis added.)

[52] Reverting to the present case, the pertinent thing here, based on proven facts, we do not find any miscarriage of justice suffered by the appellants or any prejudicial effect on all the accused on this issue. Our reasons are as follows. The amendment only as to the date of the offence which is from 29 August 2016 to 30 August 2016. The rest of the particulars of the charges remained the same and certainly does not change the nature of the charges. More importantly, the defence presented by all the accused shows that they appreciated the charges and does not in any way shows that they were confused

or misled by the amended charges. In their defence, they also made references to the amended date in the charges which was 30 August 2016. Their defence covers the date in the amended charges. This includes the alibi defence by the third accused on both the dates of 29 August 2016 and 30 August 2018. Thus, we do not find any miscarriage of justice against the appellants regarding this issue.

[53] In addition, all the accused were represented by counsels during the trial, the counsels may apply to the court, if need be, to recall any witness, and the omission of the trial judge to inform the accused's rights to recall any witnesses does not affect the decision of the case. In *Azhar bin Che Wil v Public Prosecutor* [2010] 6 MLJ 22; [2010] 8 CLJ 905, Raus FCJ explained the issue in the following manner:

> [30] The only complaint by Mr Karpal Singh was that had the charge been amended, *the accused would have had the opportunity to recall or re-summon and examine any witness and to call further evidence which may be material to his defence. But we are of the view that even without the charge being amended, the first accused is not precluded from recalling or re-summons any witness or to call for further evidence*. Cases have shown that even if a charge is amended, but *where an accused person is represented by counsel, the trial judge is not obliged to inform the accused person of his right under s 162 to recall any of the witnesses for the prosecution.* In *Moosa Abdul Rahman v The State of Kerala* [1982] Cr LJ 1384, the full bench of the High Court of Kerala held that s 217 of the Indian Criminal Procedure Code 1974 (which is in pari materia with our s 162):
>
> > ... does not cast a duty or obligation on the court to enquire of the prosecution or the accused whether they would like to recall or re-summon the witnesses ... or to call any further witnesses. The omission of the court to 'enquire of the prosecution or the accused whether they would like to exercise the right of re-calling or re-summons the witnesses would not result in any procedural illegality'.
>
> [31] The above proposition was accepted by the Court of Appeal in *Msimanga Lesaly*. Gopal Sri Ram JCA (as he then was) held that where an accused is represented by counsel it is unnecessary for the court to draw counsel's attention to s 162 of the Criminal Procedure Code or to inquire whether counsel intends to exercise the right conferred by the section.
>
> [32] We endorsed the above view. In the present case, the first accused was represented by counsel. Even though the charge was not amended, there is nothing to prevent the defence from recalling or re-summoning any witness or to call further evidence. This was not done. *Thus, the question of miscarriage of justice, as advanced by Mr. Karpal Singh does not arise at all*. (Emphasis added.)

[54] In the circumstances, it is our considered view that the issue related to the amendment of charges raised by the counsels is bereft of any merit.

The issue of accomplice evidence

[55] Counsel for the accused submitted, in essence, that PW7 was an accomplice, his evidence was uncorroborated and the trial judge had failed to warn himself of the danger in accepting uncorroborated of an accomplice. On this issue, the relevant provision to be considered is s 133 of the Evidence Act which states:

> 133. An accomplice *shall be a competent witness against an accused person* and *a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.* (Emphasis added.)

[56] Here, the first question that needs determination of this court is whether PW7 was an accomplice based on his act and involvement in the commission of the offence as stated in the charges.

[57] The law on accomplices is well settled. There is a plethora of cases by the apex court that laid down the principle of law on accomplice evidence. Essentially, accomplices are persons who are *participes criminis* in respect of the actual crime charged. This court in *Pasupathy a/l Kanagasaby v Public Prosecutor* [2005] 1 MLJ 493 mentioned this about persons who are accomplices:

> [33] The word 'accomplice' is defined in the *Oxford Dictionary of Law* (5th Ed) as 'One who is a party to a crime, either as a principal or as an accessory'. The *Cambridge Advanced Learner's Dictionary* (2003) describes him as 'A person who helps someone else to commit a crime or to do something normally wrong'. Lord Simonds LC in *Davies v DPP* [1954] 1 All ER 507; [1954] 2 WLR 343 *states the question to ask in determining whether a person is an accomplice as: 'Is there any evidence upon which the trial judge could properly rule that X was a participant in the offence?.* (Emphasis added.)

[58] In a Federal Court case of *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 the issue of who is an accomplice was explained further as follows:

> ... The question that arises is whether on these facts he can be termed as an accomplice. *In Davies v Director of Public Prosecutions [1954] 1 All ER 507 it was held that persons who are particeps criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact, are accomplices.* In explaining the role played by these categories of persons the *Law of Evidence* by Woodroffe and Amir Ali (16th Ed) (Vol 4) says at p 3434–5:
>
> > *A principal of the first degree is one who actually commits the crime; a principal of the second degree is a person who is present and assists in the perpetration of the crime; an accessory before the fact is one who counsels, incites, connives at, encourages or procures the commission of a crime everyone is an accessory after the fact to a felony*

> *who, knowing a felony to have been committed by another, receives, comforts or assists him in order to enable him to escape from punishment; or rescues him from arrest for the felony; or having in custody for the felony, intentionally and voluntarily suffers him to escape; or apposes his apprehension.* (Emphasis added.)

[59] Reverting to the facts in the present case, PW7 had no prior knowledge of the offence to be committed by all the accused. He was merely present at the crime scene and saw the third accused strike the deceased on the head as he entered the room when asked by the second accused. Thereafter PW7 was threatened by the second accused to wrap the deceased's body with a mattress and later to carry the body into the first accused's car. PW7 was then threatened by the first accused to follow them to Langkawi but later ran away from the house in Langkawi when he overheard the conversation that the third accused intended to kill him. PW7 had not played an active role in the commission of the offence charged. In the circumstances, we find PW7 was not an accomplice and the trial judge was correct in treating him as an ordinary prosecution's witness.

[60] On the same issue, the Federal Court in *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211 affirmed the decision of the Court of Appeal and the trial judge in deciding that a witness, PW14, was not an accomplice as he did not participate in the commission of the offence or had no prior knowledge that the accused intended to commit the offence. Seah FJ in that case explained the issue as follows:

> For the public prosecutor, the learned senior federal counsel had submitted that there was no evidence at the trial that PW14 Fam had taken part in the offence of murder. On the other hand PW14 was not aware that the appellant was carrying a knife hidden at the back of his trousers pocket and *that PW14 did not know that the appellant had intended to use a knife to kill the deceased*. In other words, *PW14 had no prior knowledge that the appellant had intended to commit the offence charged.*
>
> *In our judgment, and having regard to the principle enunciated in Davies v Director of Public Prosecutions [1954] AC 378 the learned counsel for appellant failed to establish that PW14 Fam participated in the offence of murder and on the evidence produced before the trial Court, the learned judge was right in not regarding PW14 as an accomplice.* (Emphasis added.)

[61] In any event, besides the provision of s 113 of the Evidence Act 1950 with regard to the competency of an accomplice as a witness, the evidence of PW7 was corroborated, in particular, by PW9 and PW10. These witnesses were found as credible witnesses by the trial judge. In the grounds of judgment, the trial judge said this:

> Keterangan saksi-saksi pendakwaan sebelum ini iaitu SP7, SP9 dan SP10 adalah kredibel dan boleh dipercayai.

[62] It is also trite that the credibility of a witness is best determined by the trial judge who has the audio-video advantage of assessing the witness.

(See *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 (FC); *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 (FC); *Md Zainuddin bin Raujan v Public Prosecutor* [2013] 4 MLJ 596 (CA).)

[63] We also noted that the trial judge did not canvass the issue of an accomplice in his grounds of judgment. Be that as it may, we had reviewed the evidence before us and found that PW7 was not an accomplice. In the Federal Court case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, it was explained as follows:

> *I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in the position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings.* In a case involving purely question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial judge are correct (see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122.)'

(see also *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579).

[64] As such, it is our view that the issue of accomplice raised by counsel for the appellants is untenable:

> *The issue whether the trial judge failed to consider that the circumstantial evidence presented by the prosecution was insufficient to prove the amended charges against all the accused and whether without the deceased body, the death and the cause of death cannot be determined.*

[65] On this issue, counsel for the third accused submitted that the circumstantial evidence before the court failed to prove the offence of murder against the third accused.

[66] It is trite law that where the prosecution is relying on circumstantial evidence to prove its case, the circumstantial evidence must irresistibly point to one and only one conclusion which is the guilt of the accused and in this case all the accused.

(See *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC).)

[67] However, in the present case, the prosecution was not only relying on circumstantial evidence, in particular, the evidence of PW9 and PW10 but also the direct evidence of PW7 who was at the scene and saw the third accused strike the deceased on the head three times with the stick until the stick broke.

[68] Here, we have analyzed the totality of the evidence before the court and agree with the trial judge that the prosecution had proved all the elements of the amended charges against all the accused. The deceased death was established by the evidence of PW4, PW5, and PW6 who testified that the deceased did not return home after he left home on 29 August 2016. PW10 then confirmed that the deceased picture (P36) was the person that she saw at the apartment on the material date. The evidence of PW7 then established the fact that the third accused intentionally inflicted the injury on the deceased which was found in the ordinary course of nature caused death. Hence, cl (c) of s 300 had been proven as discussed earlier in this judgment.

[69] Failure to find the deceased body as mentioned earlier, does not prevent a conviction of the offence of murder if the evidence is sufficient to prove the offence beyond a reasonable doubt. The classic case of *Sunny Ang* is an example to support this contention. The evidence in this case is much stronger in comparison with the prosecution's evidence in *Sunny Ang*. In the present case, there is an eyewitness that saw the commission of the offence of murder at the apartment whilst in *Sunny Ang*'s case, there was no eyewitness, the prosecution was relying purely on circumstantial evidence. Yet, in *Sunny Ang*'s case, the conviction for the offence of murder was affirmed by the Federal Court.

[70] As such, we also find that the issue of insufficient circumstantial evidence raised by the counsel for the third accused is without merit.

The issue that the trial judge failed to make a finding that the element of abetment has been proven against the first and second accused and the error by the trial judge in invoking s 34 of the Penal Code

[71] On this issue, it was submitted that the trial judge had failed to make a finding of the offence of abetment of murder against the first and the second accused. Further, it was contended that the judge had wrongly applied common intention under Section 34 of the Penal Code in the present case.

[72] As regards the offence of abetment of murder against the first and second accused, it is instructive to refresh our memory of the law about abetment. Under s 107 of the Penal Code, abetment is proven by instigation to commit the offence, or commands any person to do it, or by engaging in a conspiracy to commit it, or intentionally aiding a person to commit it.

[73] Section 107 provides:

> 107 *A person abets* the doing of a thing who —
>
> (a) *instigates* any person to do that thing;
>
> (aa) *commands* any person to do that thing;
>
> (b) *engages* with one or more other person or persons *in any conspiracy* for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (c) *intentionally aids*, by any act or illegal omission, the doing of that thing.

[74] In *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 where its decision had been affirmed by the Federal Court, Abdoolcader J explained the offence of abetment as follows:

> In connection with the charge of abetment by the first and third accused of criminal breach of trust by the second accused, I find that the acts of the first accused in respect of abetment fall within all three limbs of s 107 of the Penal Code, namely, abetment by instigation, conspiracy and intentionally aiding. With regard to the third accused, his acts come under abetment by conspiracy and intentionally aiding.
>
> *Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offence. Advice can also become instigation if that advice is meant to actively suggest or stimulate the commission of an offence (Ragunath Das v Emperor (1920) 21 Cr LJ 213). Abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means. Proof of conspiracy need not be direct proof but can be a matter of inference deduced from certain criminal acts of the accused done in pursuance of an apparent criminal purpose in common between them (Emperor v Abdul Hamid (1945) 46 Cr LR 342). Abetment by aiding takes place when a person by the commission of an act intends to facilitate and does in fact facilitate the commission of an offence (Faguna Kanta Nath v State of Assam AIR 1959 SC 673. Where there is shown a positive act of assistance voluntarily done by a person with a knowledge of the circumstances constituting the offence, the abettor is guilty of abetment by aiding (National Coal Board v Gamble [1959] 1 QB 11.* (Emphasis added.)

[75] In the present case, the evidence revealed that the first accused paid monies to the third accused to commit the offence of murder. He also used his car to carry the deceased's body to the river and later he, together with PW9 threw the deceased body in the river. The first accused then threatened PW7 to follow him to Langkawi and on the way to Langkawi, he burned the deceased bag and clothing. Thus, the offence of abetment of murder was established by the instigation of the offence, engagement in the conspiracy to commit the offence and intentionally aiding in the commission of the offence.

[76] As regards the second accused, the prosecution had established the facts that the second accused had lured the deceased to the apartment upon the instruction of the first accused with the promise to pay the second accused

RM2,500. She was the one who asked PW7 to enter the room at the apartment where PW7 saw the third accused strike the deceased on the head with a stick. She then asked the thirdaccused whether the third accused had finished with the job. She also asked PW7 together with the third accused to wrap the deceased body with the mattress and then to wait for the first accused. Upon the first accused's arrival at the apartment, the second accused instructed PW7 and the third accused to carry the deceased body into the first accused's car and threatened to implicate PW7 with the incident if he refused to cooperate. The second accused also instructed PW7 to clean the blood stains on the wall and the floor of the said room and she later burned the blanket and pillow in the room that was covered with blood stains. Eventually, immediately after the incident, she went to Langkawi together with the first accused and PW7. In the circumstances, the second accused had abetted the offence of murder by instigation, conspiracy in the commission of the offence and intentionally aiding the commission of the murder by the third accused.

[77] Having reviewed the evidence before the court, we find that there is overwhelming evidence that the first and second accused abetted the commission of the murder by the third accused although the trial judge had not addressed the issue of abetment by the first and second accused. Here, the prosecution had proved the charge of abetment against the first and second accused.

[78] We noted that the trial judge did discuss the application of s 34 of the Penal Code in his grounds of judgment but based on the overwhelming evidence that proved the offence of abetment of murder as alluded to earlier, we are of the view that there is no miscarriage of justice against the first and the second accused on this misapplication of the law by the trial judge. In any event, the trial judge did mention in his grounds of judgment that the prosecution had proved the offence of abetment of murder against the first and second accused when he said this:

> Pembelaan telah dilangsungkan dan di akhir kes pembelaan, saya memutuskan pihak *pendakwaan telah berjaya membuktikan kes mereka melampaui keraguan yang munasabah untuk suatu kesalahan di bawah* seksyen 109 dibaca bersama seksyen 302 Kanun Keseksaan*, bagi tertuduh pertama dan kedua* dan seksyen 302 bagi tertuduh ketiga.

[79] On the issue of miscarriage of justice, an analogy can be made from the decision of the Federal Court in the case of *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 where this was said:

> [11] In our respectful view, Arulpragasan is authority for the proposition that the test to be applied under the former ss. 173(f) and 180 of the CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused

A could be called upon to enter his defence. It is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. *The failure by the trial court either to make or to record such a finding does not in our judgment occasion a miscarriage of justice …* (Emphasis added.)

B

[80] In that case, the trial judge failed to make a finding that the prosecution had proved its case and yet it was the court's view that the failure does not occasion a miscarriage of justice. Likewise, in the present case, the failure of the trial judge to mention specifically that the abetment offence has been proven C does not result in any miscarriage of justice against the first and second accused However, as referred earlier that the trial judge did mention that the prosecution had proved the offence under s 109 read with s 302 against the first and second accused which is the offence of abetment of murder.

D

[81] Therefore, we do not find any merit in the issue that was raised by counsel for the appellants.

The issue of adverse inference under s 114(g) of the Evidence Act 1950 against the defence

E

[82] Lastly, counsel for the second accused contended that the trial judge erred in invoking the adverse inference against the second and third accused for their failure to call the names mentioned in their defence as witnesses.

F

[83] It is trite that at the end of the defence case, to earn an acquittal and discharge, an accused only has to raise reasonable doubt to the prosecution case. It is not the duty of the accused to call witnesses to prove his innocence.

(See *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19; [1967] 1 LNS 179 (FC); G *Abu Bakar v Regina* [1963] 1 MLJ 288; [1963] 1 LNS 4.)

[84] In the present case, we find that the trial judge did assess in detail the evidence of the defence as reflected at pp 25 until 41 of the grounds of judgment, and at the end of the case, found that the defence had failed to raise H a reasonable doubt on the prosecution case. In the grounds of judgment, this is what the trial judge concluded:

Jadi persoalannya, adakah keterangan dari tertuduh-tertuduh ini telah berjaya menimbulkan keraguan yang munasabah terhadap kes pendakwaan? Di dalam sesuatu perbicaraan, adalah menjadi tugas mahkamah untuk melakukan penilaian I secara keseluruhan. Keterangan dari saksi-saksi pendakwaan perlu diteliti dan dipertimbangkan Bersama dengan keterangan saksi-saksi pembelaan, bagi dibuat penilaian sebelum suatu keputusan dicapai. Di dalam melaksanakan penelitian tersebut, keterangan terperinci setiap saksi perlu dilakukan. *Meneliti serta menilai semula keterangan yang disampaikan oleh saksi-saksi, saya mendapati keterangan*

pembelaan telah gagal menimbulkan keraguan yang munasabah di dalam kes pendakwaan. (Emphasis added.)

[85] Here, we find the basis of the trial judge's finding that the defence had failed to raise reasonable doubt on the prosecution case was based on the evaluation of the evidence in totality and not on the adverse inference made against the accused. In the circumstances and with the overwhelming evidence against all the accused in this case, we find that there is no miscarriage of justice against all the accused that occurred in relation to this issue. A reasonable tribunal would have also convicted all the accused on the available evidence in this case (see *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381).

CONCLUSION

[86] Based on the aforesaid reasons, we find that there is no reason to interfere with the decision of the trial judge. Hence, it is our unanimous decision that the appeal by all the accused in Appeal No B-05(M)-521–11 of 2019, No B-05(M)-522–11 of 2019 and No B-05(M)-523–11 of 2019 are dismissed and the decision of the High Court is hereby affirmed.

Appeals dismissed; decision of the High Court affirmed.

Reported by K Selvaraju